No. 7307

In the United States Circuit Court of Appeals for the Ninth Circuit

STANLEY S. ANDERSON, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN G. REMEY,
Special Assistant to the Attorney General.

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OPINION BELOW

The only previous opinion is that of the United States Board of Tax Appeals (R. 38–48), which is reported in 28 B.T.A. 179.

JURISDICTION

This appeal involves income taxes for the years 1924 and 1925 amounting to $19,036.61 and $9,752.59, respectively, and is taken from an order of redetermination entered May 26, 1933 (R. 48). This appeal is brought to this Court by a petition for review filed August 17, 1933 (R. 49–63), pursuant to the provisions of the Revenue Act of 1926,

c. 27, 44 Stat. 9, 109–110, Sections 1001, 1002, and 1003, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

Whether the income from certain investments is taxable to the petitioner as income from community property or is taxable to petitioner's wife as income from her separate property.

STATUTES INVOLVED

They will be found in the appendix, *infra,* p. 22.

STATEMENT

The facts found by the Board are as follows (R. 30–38):

The petitioner and wife, Marguerite S. Anderson, citizens of the State of California, were married in 1914. The petitioner at that time was employed as assistant manager of the Beverly Hills Hotel, which was owned by his mother, Margaret Anderson, at a salary of $3,000 per annum. At the time of their marriage neither the petitioner nor his wife owned any property of consequence. The petitioner's employment with the hotel continued until the World War, when he went abroad.

From 1914 to 1923, inclusive, the petitioner's wife acted as a hostess for the hotel, devoting all of her time to that business. Her duties were to provide entertainment and to arrange social functions for the guests and to secure new patrons. The hotel catered to the wealthy class.

At the time of her marriage, the petitioner's wife received a a gift of $5,000 from her father, J. H. Slattery. Thereafter, for five or six years, she received additional gifts from him, aggregating about $20,000. This money was used for various purposes, including household expenses.

In 1916 the petitioner's wife learned that a friend of hers was interested in buying an estate in the Beverly Hills section. She and the petitioner located a desirable piece of property and negotiated the sale, receiving a commission of $10,000, which was paid to the petitioner, it being agreed between them, however, that the commission should belong one half to each.

In May 1916 the petitioner and his wife purchased five vacant lots in Beverly Hills at a total cost of $13,200, which amount they paid with the $10,000 commission referred to above and $3,200 which the petitioner's wife secured from her father. The deeds to the lots were taken in the petitioner's name and so remained until May 1932 when new deeds were made to the petitioner and his wife as tenants in common.

While the petitioner was overseas and prior to his return in 1919 the petitioner's wife and his mother entered into an oral agreement whereby she, the petitioner's wife, and the petitioner, upon his return, were to take over the entire management of the hotel and were to receive a stipulated yearly salary of $3,000 plus one half of the net

profits. As a consideration for this agreement the petitioner's wife was to render full-time services to the hotel. It was specifically agreed that she would share equally with the petitioner the yearly salary and the profits, if any. Under this contract, the petitioner and his wife received profits over the period 1919 to 1923, inclusive, of approximately $140,000. This amount, together with the salary of $3,000 per year, was paid to the petitioner by checks drawn on the hotel by himself as manager and was deposited by him in a joint bank account for himself and wife.

In September 1923 the petitioner, with the knowledge and consent of his wife, entered into agreements with the Janss Investment Company and Charles H. Christie for the acquisition of certain undivided interests in two real-estate subdivisions. The contracts were signed by the petitioner and deeds were made out in his name. The total investment therein of the petitioner and his wife was approximately $56,000, which was paid, for the most part, out of the profits from the hotel. Soon after this transaction the petitioner's wife asked him to prepare a written memorandum defining his and her respective rights in the investment. Accordingly, the petitioner, on September 5, 1923, prepared and delivered to his wife the following letter (R. 33–34):

> Confirming our conversation relative to the Janss Investment and Charlie Christie land deal.

Charlie and I agree to purchase from Janss 120.5 acres for $180,750 (for one-half interest, Janss retaining one half), payable $60,250 cash in September and October, and notes for the balance of $120,500. On this deal I today paid $5,000 on the September installment. I also entered into an agreement to purchase from Charlie Christie a ¼ interest in 107 acres, the total price of the acreage being $320,000 and our ¼ will amount to $80,250. Under the agreement by which Charlie is buying this land from Janss he is to pay $107,000 cash and notes for $214,000. The cash payments are to be made in September and October and I today paid $6,250, which is ¼ of the cash payment due in Sept.

I understand from you that you agree to these transactions and agree to payment of your proportion of the cash payments from any funds now held jointly by us, and that you assume liability for your proportion of future payments, such liability to attach to your separate funds as well as those held jointly by us.

It is the belief of Janss and Charlie that with the placing of this property on the market, the notes will be paid off from sales and we will not be called upon for cash to meet same.

Should you for any reason have occasion, in my absence or in case of any misunderstanding arising later, to secure further details relative to this, Dr. J. will give you same.

A copy of the above letter was filed at the office of the Janss Investment Company, and Charles H. Christie also was advised of its contents.

In the Janss Investment Company's books an account was kept in the petitioner's name until January 1929 when the business was taken over by a newly organized corporation. In the books of the new company separate accounts were set up for the petitioner and his wife showing them owners of separate equal interests.

From time to time the petitioner and his wife made other investments with their joint earnings and profits, with the understanding and agreement that they were equal owners therein and that each was entitled to receive one half of the profits and was liable for one half of the losses.

The petitioner's wife at all times took an active interest in the affairs of the real-estate syndicate. She frequently discussed matters of policy with the managers and gave her approval to the plans for the development and sale of the property. She signed all the deeds and mortgages and other papers of that character. Edwin Janss, president of the Janss Investment Company, and Charles H. Christie both understood that Marguerite S. Anderson and the petitioner owned equal interests in their investment. In August 1926 the Janss Investment Company deeded back to "Stanley S. Anderson and Marguerite S. Anderson" an undivided one fourth interest in thirty-seven acres of the syndicate property which had not been sold.

In February 1924 the petitioner and his wife executed and delivered to Edwin Janss and Harold Janss a general power of attorney, which was duly recorded. On January 27, 1925, the petitioner's wife executed and delivered a similar power of attorney to the petitioner.

In the latter part of 1924 the auditor for the Beverly Hills Hotel, upon request of the hotel bookkeeper, opened up a separate set of books for the petitioner as of January 1, 1925. Near the end of 1926 the petitioner inquired if his wife's share of the earnings from the "Young Building" was being credited to her and, being informed that it was not, had the auditor open an account entitled "Joint M. S. Anderson" in which was set up the Young's Building at a valuation of $202,788. Also, at about that time, another account was opened as of January 1, 1926, entitled "Janss Inv. Co. Joint M. S. Anderson." Also, at about that time, another account was set up for "Marguerite S. Anderson."

On June 8, 1932, the petitioner and his wife, upon the advice of her attorney, executed a memorandum agreement providing in part as follows (R. 36–37):

> WHEREAS the parties hereto were married in 1914 and at the time of said marriage neither had any property, and shortly thereafter an agreement was made between them to the effect that all property acquired by either after the date of their marriage, whether separate or community, should be

deemed to be and should constitute the property of both of them as tenants in common, each owning an undivided one-half interest therein; and

WHEREAS about this time or shortly thereafter Mrs. Anderson received from her father, as a gift to her, various sums of money aggregating in all approximately $20,000.00, which she turned over to Mr. Anderson when and as received to invest under said agreement; and

WHEREAS Mr. Anderson used said money, together with various earnings of both of them and various property which he received by gift from his mother, and proceeds and avails of all of said property, in purchasing, owning, and selling real estate and other property, and for the purpose of convenience has carried the legal title to all property so acquired in his own name, but as trustee for himself and Mrs. Anderson as tenants in common, and said property has at all times constituted and does now constitute the property of the parties hereto as tenants in common, each owning an undivided one half interest therein; and

WHEREAS the parties desire to confirm the agreement between themselves hereinbefore referred to and to reduce the same to writing and thenceforward to have the legal title to all real property acquired by them during their said marriage, from whatever source, held in their joint names as tenants in common pursuant to said agreement:

NOW, THEREFORE, it is MUTUALLY AGREED by and between the parties hereto as follows:

1. All property whatsoever, whether separate or community, heretofore or hereafter acquired by either of the parties hereto since and during their marriage and howsoever the legal title thereto may be held, constitutes the property and is owned by them jointly as tenants in common, each owning an undivided one-half interest therein as his and her respective separate property, and none of said property, no matter how the legal title thereto may be held, is or shall be owned in any other way than as tenants in common, each owning an undivided one-half interest therein as his and her respective separate property.

For the calendar years 1920 to 1923, inclusive, the petitioner and his wife filed joint returns which were prepared for them by the hotel auditor. The petitioner informed the auditor in 1920 that one half of the profits from the hotel belonged to his wife separately, but the auditor advised him that it was necessary under the law and the Commissioner's regulations to report all the income in joint returns. For the years 1924 and 1925 the petitioner and his wife filed separate returns in which they each reported one half of their entire income. The respondent in his audit of the returns for 1924 and 1925 has held the petitioner liable for taxes upon the entire amount of the income reported in

both the returns. The items of income which the petitioner alleges, in his amended petition, were erroneously included in his income and which are taxable to his wife, are as follows:

1924

Interest from notes, mortgages, and bank deposits	$1,698.63
Rents from real property	9,876.18
Profits on sales of stocks and real property	6,768.19
Dividends from stocks	2,000.00
Profit from joint ventures in real estate	29,506.56
Capital net gain	16,747.00

1925

Interest from notes, mortgages, and bank deposits	$964.78
Rents from real property	5,342.80
Dividends on stocks	4,751.83
Profit from joint ventures in real estate	28,541.55
Loss from joint ventures in real estate	2,162.89

The Board approved the Commissioner's determination and the petitioner appeals.

SUMMARY OF ARGUMENT

It is the contention of the petitioner that the properties held in his name during the taxable years were owned by himself and his wife equally as tenants in common and accordingly one half of the income is taxable to her on her separate return.

Under the law of California at the time of the acquisition of the property from which the income here involved was derived, all the property acquired by husband or wife after marriage was presumed to be community property subject to the disposition of the husband with all the powers of own-

ership. The income from such property was the income of the husband.

Petitioner seeks to overcome this presumption by alleging the existence of a mutual agreement vesting in the wife a separate property in one half of their earnings and in one half of the investments made with such earnings. The Board found that no such agreement existed prior to the one formerly entered into in 1932 just a few days before the trial of this case. A careful analysis of the evidence does not compel a contrary conclusion.

ARGUMENT

The income here involved was derived from community property and not from the separate property of petitioner's wife

Petitioner contends that his wife was the owner of an undivided one-half interest in all the property which produced the income here involved in that legally sufficient agreements constituted them tenants in common, each owning an undivided one-half interest as his or her separate property. The Board decided that the evidence failed to establish an agreement whereby there was vested in her a separate one-half interest in the property from which the income was derived.

On June 8, 1932, a few days before the trial of this case before the Board, petitioner and his wife executed a formal agreement defining the separate interests of each in all their property. This of course can have no effect upon the community prop-

erty or the income therefrom in the taxable years 1924 and 1925. In those years all property acquired after marriage except that acquired by gift, bequest, devise, or descent, was community property. The income of both spouses was returnable by and taxable to the husband. *Blair* v. *Roth,* 22 F. (2d) 932 (C.C.A. 9th), certiorari denied, 277 U.S. 588; *Pedder* v. *Commissioner,* 60 F. (2d) 866 (C.C.A. 9th). Petitioner has sought to alter this property relationship by attempting to prove the existence of an agreement purporting to vest in her a separate property in the assets producing the income here in question. It is submitted that the evidence does not establish such an agreement.

The earnings and profits of the petitioner and his wife for the years 1916 to 1923 totaled approximately $165,000. Presumably this amount was reported by the petitioner in his returns for those years since it was all taxable to him as community income. A part of this income was invested in real estate, stocks, mortgages, etc., which properties produced in 1924 and 1925 the income here in question. Petitioner contends that it was received by his wife from her separate property and is therefore taxable to her. He argues that after community earnings have been received and taxed to the husband, they may be transmuted by agreement of the spouses into separate property, that when they have been so transmuted and have been invested in real and personal property owned by

the spouses as tenants in common, each spouse being the owner of an undivided one-half interest therein as his or her separate property, the income thereafter produced from such investments is the separate property of the two spouses, each being the owner of and taxable on one half of such income. This argument presupposes a specific express agreement between petitioner and his wife to vest the latter with an undivided one-half interest in the income or the property as her separate estate. The Board held that the understanding, if one there was, was merely that their income and property should be owned by them "on an equal footing", citing *Blair* v. *Roth, supra.*

In 1916 petitioner received $10,000 representing a commission for services rendered by himself and his wife in negotiating a sale of real estate. Petitioner contends that half of this commission was by agreement the separate property of his wife. They so testified in reply to highly leading questions but the facts negative the existence of any such agreement. The petitioner received the commission, he did not divide it with his wife and she did not ask for it. The only way he could have separated any part of this sum from the community fund was to make a gift of it to her. But there was no gift. There was no delivery. The entire sum plus $3,200 received by Mrs. Anderson from her father was invested in five lots. Both testified that they expressly agreed in 1916 that she was to own

a half interest as her separate property in the lots (R. 109). But the evidence again fails to support this statement. All the lots were taken in petitioner's name (R. 90–91). This fact petitioner's wife did not know until a short time before the trial (R. 111), when new deeds were made to the petitioner and his wife as tenants in common (R. 418). There was no division of profits, no accounting of any additional amounts contributed by each for improvements on the lots. The Young's Building was erected on a part of the five lots and it was not until 1926 that an account for this building was set up and then it was a joint account entitled "Joint M. S. Anderson" (R. 35). From 1920 to 1923, inclusive, profits amounting to $140,000 were derived by the petitioner and his wife from the operation of a hotel. Again they testified that it was expressly agreed that she was to have one half of this amount as her separate property (R. 93, 110), though there is no evidence of a gift or of an actual division of this community property. Checks representing their share of the hotel profits were always made out to the petitioner and the proceeds controlled by him. No record of her separate property in such profits was kept. They were the joint earnings of both and accordingly community property. In 1923 petitioner entered into an agreement with the Janas Investment Company and Charles H. Christie for the acquisition of an interest in two real-estate subdivisions. Petitioner

and his wife testified that there was an express agreement that she would own a one half interest in the investment as her separate property (R. 95, 113). It should be noted that this is the fourth so-called "express agreement" as to separate properties, the other three relating to the real-estate commission, the five lots and the hotel earnings, this despite the wife's testimony that it was understood at all times that one half of the property they might acquire and one half of the money that they might make was to be her separate property (R. 102). Petitioner himself testified that every investment he made was a joint agreement (R. 111).

The contracts for the purchase of an interest in the real-estate subdivisions were signed by the petitioner and deeds were made out in his name. The investment therein of petitioner and his wife was $56,000, most of which came out of the profits from the hotel. If Mrs. Anderson did not acquire a separate property in the earnings and profits of the hotel it is clear that she could not have contributed one half of the capital invested in the subdivision. No gift or express agreement creating a separate property in the real estate is disclosed prior to the one of June 8, 1932. The deeds were in petitioner's name and though she joined with her husband in signing notes, mortgages, and assignments, she alleges that she never noticed that her name was not on these instruments. No accounts or records were kept indicating the inten-

tion to create a separate estate in the wife. It was not until 1926 that the Janss Investment Company set up a joint account entitled "Janss Investment Company Joint M. S. Anderson." Prior to that an account was carried in petitioner's name only. Janss testified that for his protection he required Mrs. Anderson's signature to every document (R. 73). This of course does not prove a separate property in her. The letter of September 5, 1923, relied upon by the petitioner, is not nor does it purport to be an agreement creating a separate property in the wife in the real estate subdivisions.

He explains therein the land deal and states that he understands that she agrees to the payment of her proportion of the cash payments from any funds then held jointly by them. He also understands that she remains liable for her proportion of future payments, such liability to attach to her separate funds as well as those held jointly by them. This letter was written to Mrs. Anderson after the petitioner had contracted and obligated himself alone. No conveyance to her of a separate property in the real estate is disclosed. On the other hand, the initial payments due under the contracts were to come out of funds held jointly; that is, out of community funds. Payments to meet subsequent liabilities were to come out of either separate funds or those held jointly. Whether they were actually paid out of the former or the latter is not disclosed. If the former they of course came out

of community funds; if out of the latter the amount withdrawn is not disclosed. It is submitted that the evidence does not disclose an agreement, and that the earnings of each constituted the separate property of the earner or that the investments made with such earnings were to be held as joint tenants.

At most there was an understanding that the earnings of both should be contributed to a common fund and that they would share alike in the profits from investments acquired with such common funds. Such an understanding does not overcome the presumption that such earnings and profits are community funds. *Pedder* v. *Commissioner, supra.* In that case the husband placed the earnings from his law practice in joint bank accounts. These funds he invested in income producing properties, all of which he held in his name. He sought to segregate the income which he collected from these investments into two equal parts, one half taxable to himself and the other half to his wife. When confronted with the presumption that the investment property was community property, he relied upon a showing that the funds invested in the property were at one time deposited by him in a joint bank account subject to check by either party and upon the testimony that the balance was to be paid to the survivor in case of death. His contention was that these facts created a joint tenancy. This Court held that though it may be con-

ceded that community funds deposited by the husband in a joint bank account accompanied by an agreement of the parties in writing that the funds were subject to be withdrawn by either party during their joint lives and by the survivor upon the death of one of the spouses, are impressed with the character of a joint tenancy, the facts disclosed were not sufficient to overcome the presumption that the property was community property. In the instant case there was no agreement in writing prior to 1932. The earnings of both husband and wife were received by petitioner and were always under his dominion and control. The investments were held in his name and there is no record of any accounting to her of any of the income therefrom. The disclosed facts negative the testimony of petitioner and his wife that she had a separate vested one-half interest in either the earnings or the investments.

In *Blair* v. *Roth, supra,* the wife alleged that the agreement was that she should continue to have control of her earnings. This allegation the court said was not supported by the evidence. There was no writing. The court said that the agreement was merely that they would contribute their earnings to a common fund out of which their personal and community expenses would be paid and of the savings, if any, and the property in which such savings were invested, they were to be equal owners upon an equal footing. It was held that such agreement was ineffective to alter the community

property status. In the instant case the facts appear to go no further toward establishing a separate property in the wife than those in *Blair* v. *Roth.*

Petitioner concedes for the purpose of this appeal that the earnings of petitioner and his wife in prior years were properly taxable to the husband as community income for the taxable years in which received. In this there appears to be an inconsistency in view of the statements that agreements existed creating separate properties in the income earned by each. Petitioner might well have urged in those years that such agreements were effective to arrest the earnings at the threshold of the community fund and thus show that liability for the tax should not have fallen upon the husband alone. It may be stated parenthetically that joint and not separate returns were filed by husband and wife for the years 1920 to 1923, inclusive.

An oral agreement was relied upon in *Belcher* v. *Lucas,* 39 F. (2d) 74 (C.C.A. 9th), to show a wife's separate property in her own earnings. By agreement it was understood that both would continue in business, that all earnings, income, and properties acquired by both during their married life would be owned by them fifty-fifty, that they would be equal partners in all respects, equally owning and enjoying their earnings and acquisitions of property. In accordance with this agreement their property, accumulations, earnings, and

incomes were continually since the date of marriage combined in a common fund from which all expenses of both have been paid as evidenced by joint bank accounts created immediately after marriage where all salaries, earnings, and profits from whatever source were deposited and against which account each was authorized by written contract with the banking institution to draw. Upon these facts this Court refused to hold that the wife had a separate property in her earnings. A similar conclusion must be reached in this case upon facts less favorable to the taxpayer. If it is concluded that the earnings and profits of petitioner and his wife were community earnings taxable to the husband, the case is narrowed to a search for an agreement creating a separate property in the wife in such earnings and profits when they were invested in income-producing property, or an agreement vesting in the wife a separate property in the investments themselves. It is submitted that the above analysis of the evidence fails to establish the existence of either kind of agreement.

Mrs. Anderson contributed $3,200 to the purchase of five lots. This amount was a gift from her father and was her separate property and the income therefrom is taxable to her. The lots were purchased in 1916 for $13,200. Petitioner contends that 32/132 of the income received in 1924 and 1925 from these lots is taxable to her. There is no proof that she is entitled to that fractional part of the income. From 1916 on extensive improve-

ments were made to the property from community funds as, for example, the Young's Building. Hence the denominator must be increased making her fractional share very much smaller than 32/132. How much smaller the record fails to disclose. This failure of proof must defeat petitioner's claim. *Burnet* v. *Houston,* 283 U.S. 223.

This Court may consider findings of fact which appear in the opinion of the Board. *California Iron Yards Co.* v. *Commissioner,* 47 F. (2d) 514 (C.C.A. 9th); *Commissioner* v. *Crescent Leather Co.,* 40 F. (2d) 833 (C.C.A. 1st). Is is submitted that the evidence does not compel the conclusion that the property from which the income in question was derived was held by petitioner and his wife as joint tenants. With the probative force of factual inferences reasonably drawn this Court can have no concern. *Crowell* v. *Commissioner,* 62 F. (2d) 51 (C.C.A. 6th). It cannot be said upon this record that the respondent's determination was so clearly wrong as to have required a contrary finding by the Board.

CONCLUSION

The decision of the Board is correct and should be affirmed.

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SEWALL KEY,
JOHN G. REMEY,
Special Assistants to the Attorney General.

MARCH 1934.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 213. * * *
>
> (a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever (U.S.C., Title 26, Sec. 954).

Section 213 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U.S.C.App., Title 26, Sec. 954), is identical.

U. S. GOVERNMENT PRINTING OFFICE: 1934